(3)

No. 99-1953

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, *ET AL.*,
*Petitioners*,
v.
TRI COUNTY INDUSTRIES, INC.,
*Respondent*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

# REPLY TO BRIEF IN OPPOSITION


ROBERT R. RIGSBY
*Corporation Counsel*

CHARLES L. REISCHEL
*Deputy Corporation Counsel*
*Appellate Division*

DONNA M. MURASKY
*Senior Assistant Corporation Counsel*
*Counsel of Record*

Office of the Corporation Counsel
Government of the District of Columbia
One Judiciary Square – 6th Floor South
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252
(202) 724-5691

## TABLE OF CONTENTS


Page

ARGUMENT . . . . . 1

I. TRI COUNTY'S OPPOSITION RESTS ON A FATAL AND FUNDAMENTAL FLAW. . . . . 1

II. TRI COUNTY MISSTATES THE RECORD WHEN IT ASSERTS THAT THE DISTRICT OF COLUMBIA WAIVED THE ISSUE SET FORTH IN THE QUESTION PRESENTED. . . . . 2

III. TRI COUNTY PLAINLY ERRS IN ASSERTING THAT THE DECISION BELOW IS NOT IN CONFLICT WITH *GASPERINI* AND THE DECISIONS OF OTHER CIRCUITS. . . . . 5

IV. THIS COURT SHOULD NOT STAY ITS HAND BECAUSE OF ANY OF TRI COUNTY'S OTHER ARGUMENTS. . . . . 8

CONCLUSION . . . . . 9


## TABLE OF AUTHORITIES


*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) . . . . . *passim*

*Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987) . . . . . 5, 6

*Hutchinson v. Stuckey*, 952 F.2d 1418 (D.C. Cir. 1992) . . . . . 2

*Lind v. Schenley Industries, Inc.*, 278 F.2d 79 (3rd Cir.) (*en banc*), *cert. denied*, 364 U.S. 835 (1960) . . 2, 4, 6

*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988) . . . . . 4, 5

*Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997) . . . . . 5, 6, 7

DISTRICT OF COLUMBIA, *ET AL.*,
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## Reply to Brief in Opposition

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## ARGUMENT

### I. TRI COUNTY'S OPPOSITION RESTS ON A FATAL AND FUNDAMENTAL FLAW.

Tri County's Opposition rests on a fatal and fundamental flaw: its insistence that the D.C. Circuit's "more searching inquiry" standard for reviewing orders granting new trials, and similar standards in the Third, Fifth, Sixth and Eighth Circuits, are identical to the abuse of discretion standard adopted by this Court in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), and by the Second, Fourth, Seventh, Ninth and Eleventh Circuits. This error underlies, and thereby undermines, its waiver argument and its arguments that (1) the decision below does not conflict with *Gasperini*; (2) there is no inter-Circuit conflict; (3) the D.C. Circuit applied the correct standard of appellate review; and, (4) in the alternative, review should be denied because the D.C. Circuit would reach the same decision under the proper standard of appellate review.

The standard adopted by the D.C. Circuit, and the Circuits aligned with it, is not a directive that appellate courts should review case records with care (which, of course, they should always do). If Tri County were correct, the federal judiciary has squandered a great deal of time over a non-issue.

Instead, the "more searching inquiry" standard is a substantive standard under which the scope of appellate review is broad and the discretion of the district court to grant new trials is circumscribed "'in order to protect the litigants' [Seventh Amendment] right to jury trial.'" *Hutchinson v. Stuckey*, 952 F.2d 1418, 1421 (D.C. Cir. 1992), quoting *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir.), (*en banc*), *cert. denied*, 364 U.S. 835 (1960). By contrast, under the abuse of discretion standard, the scope of appellate review is circumscribed and the discretion of the district court is broad. In the latter instance, given the active oversight role the Seventh Amendment assigns to trial judges, an appellate court must "give the benefit of every doubt to the judgment of the trial judge" in view of his "unique opportunity to consider the evidence in the living courtroom context." *Gasperini*, 518 U.S. at 438-39 & 438 (internal quotation marks omitted).

## II. Tri County Misstates the Record When It Asserts that the District of Columbia Waived the Issue Set Forth in the Question Presented.

Tri County asserts that the District of Columbia did not argue that the standard of review is abuse of discretion until after the decision for which review is sought here. Opp. 7-9. This argument flatly misstates the record.

As Tri County admits, the Federal Rules of Appellate Procedure required it to set forth the standard of review in its opening brief in the court below. Opp. 7. That brief repeatedly stated that the standard of review was abuse of discretion. And the District expressly agreed with that standard.

More specifically, in its opening brief, under the "ARGUMENT" section, Tri County had a caption "A. THE FIRST



TRIAL - STANDARD OF REVIEW." Brief vi & 30. It then set forth four arguments why the new trial order should be overturned. Each of these arguments contained the following language in the caption: "THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT . . .." Brief vi, 31, 36, 44 & 45. In addition, the first sentence in each of these arguments was: "The standard of review on this issue is abuse of discretion." Brief 31, 36, 44 & 45. Tri County's statement of the corresponding four issues presented was comparably phrased: "DID THE DISTRICT COURT ABUSE ITS DISCRETION BY GRANTING A NEW TRIAL ON THE GROUNDS THAT . . .?" Brief 2-3. As Tri County admits in this Court, the District agreed with this standard of review in its brief as appellee. Opp. 8 n.3. The District did not, however, as Tri County implicitly concedes, agree with Tri County's almost casual reference to "close scrutiny" in its general discussion of the standard of review.[1] Accordingly, the parties agreed on the standard of review.

At oral argument, however, it became apparent that the court below did not accept the abuse of discretion standard. Thus, when counsel for the District urged that the court, in order to reverse the new-trial order, "has to find that Judge Robertson abused his discretion, which is . . . a high stan-

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[1]Tri County, apparently in the belief that "close scrutiny" means only a careful examination of the record, mentioned this language only once when it stated that "[t]he trial court's decision to grant a new trial will be given close scrutiny in order to protect the litigants' right to a jury trial." Brief 30. We emphasized this language in our Petition because the court below, in fact, adopted this standard and evidently concluded that, despite Tri County's repeated invocation of the abuse of discretion standard, this single reference precluded a finding that it had waived the "close scrutiny" standard.

dard," the panel vigorously rejected the argument. Transcript of Argument 16 (Nov. 12, 1999). The court responded:

> THE COURT: **No, now wait, no, no, no[!]**
> THE COURT: **No[!]**
> THE COURT: **No. That's not what Hi[]-Lo[] says, does it?**

*Id.* (Emphases added to reflect the tenor of the responses).

*McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988), of course, reflects the D.C. Circuit's current rules for ordering new trials and for appellate review of new trials. In contrast to the cases cited by the District in its brief, however, *Hi-Lo* requires the D.C. Circuit to give "'close scrutiny'" to new trial orders "'in order to protect the litigants' right to jury trial'" and correspondingly constrains the discretion of the district court to grant new trials. *Id.* at 647, quoting *Lind*, 278 F.2d at 90. Or, as the court put it at argument, "there is a very tough standard in this Circuit . . . of taking the case from the jury." Transcript 16.

In short, the District unquestionably argued before the decision below that an appellate court must give deference to a district court's decision to grant a new trial and can reverse only if it finds an abuse of discretion. See also Cert. Pet. 11. It is equally clear that the panel understood the District's proffered standard and decisively rejected it. See also App. 5 & 10 ("more searching inquiry" is required). And it did so even though Tri County repeatedly had urged that an abuse of discretion standard applied to its assignments of error.[2]

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[2]The foregoing also disposes of two of Tri County's related assertions: (1) the panel at argument was concerned only with the (continued...)



## III. TRI COUNTY PLAINLY ERRS IN ASSERTING THAT THE DECISION BELOW IS NOT IN CONFLICT WITH *GASPERINI* AND THE DECISIONS OF OTHER CIRCUITS.

Tri County's position that there is no conflict among the Circuits rests on misguided legal arguments and a misrepresentation of the Seventh Circuit's decision in *Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.*, 106 F.3d 1388 (7th Cir. 1997).

A. Tri County argues that there is no difference between the abuse of discretion standard and the "more searching inquiry" standard applied in this case. As we already have explained, however, this is refuted by the very decision for which review is sought here, by *Gasperini*, and by the Circuit Court decisions cited in the Petition, including *Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir. 1987), and *Medcom*.

B. Tri County claims that the decision below does not conflict with *Gasperini* because *Gasperini* is limited to "excessive jury verdicts" and the district court here simply applied the "wrong law . . .." Opp. 9 & 10. See also Opp. 16 (The issues Tri County raised on appeal "did not involve discretionary decisions . . . which . . . might be accorded some degree

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[2](...continued)
scope of the district court's discretion and not with the standard of appellate review; and (2) the D.C. Circuit applied the usual abuse of discretion standard in this case. Opp. 12-13. At oral argument, the panel decisively rejected the abuse of discretion standard of appellate review and the concomitant expansion of the district court's discretion to grant new trials. Its decision in this case, in turn, expressly reflects its adherence to *Hi-Lo* and its progeny.

of deference."). This claim is frivolous, as Tri County's repeated invocation below of the abuse of discretion standard suggests. And Tri County was correct to invoke this standard given the issues it was raising on appeal: The district court's rulings that it failed to mitigate damages; that its evidence of lost profits was speculative; that the award of lost profits was excessive; and that the court properly excluded and struck from the jury's consideration the District's evidence that future community resistance and regulatory barriers would have doomed its soil remediation facility. Brief for Appellant vi & 31-46.[3]

C. Tri County argues that *Gill* misinterpreted *Lind*. Opp. 14. This is not true. The Fourth Circuit correctly understood the Third Circuit's standard for reviewing orders granting new trials on the ground that the jury's verdict is against the weight of the evidence and unquestionably rejected it as inconsistent with the Seventh Amendment. See Cert. Pet. 25. Indeed, even Tri County concedes that *Lind* "require[s] a closer degree of scrutiny when a jury verdict is set aside as being against the weight of the evidence." Opp. 14.

D. Tri County asserts that *Medcom* "does not even discuss if close scrutiny of the record is appropriate under an abuse of discretion standard of review." Opp. 13. This is flatly wrong. In *Medcom*, the Seventh Circuit ruled that

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[3]In support of this point, Tri County argues that the district court committed legal error because the D.C. Circuit has ruled that a verdict which is "within the range of the evidence [, no matter how flimsy,] . . . cannot be treated as excessive by the [district] court." Opp. 10. Assuming *arguendo* that the D.C. Circuit has adopted such an extraordinary rule, it is plain that such a rule strikes at the heart of the role the Seventh Amendment assigns to the district court and is thus unconstitutional. See Cert. Pet. 17.



*Gasperini* required it to abandon its "more exacting" standard of review, the standard which the D.C. Circuit continues to embrace, and to review grants of new trials "with somewhat more deference to the district court, utilizing an ordinary abuse of discretion standard . . .." 106 F.3d at 1397.

E. Tri County asserts that, although it advocated a close scrutiny standard in the court below, "[t]he D.C. Circuit utilized the same ordinary abuse of discretion standard in this case" as the Seventh Circuit did in *Medcom*. Opp. 13. This is manifestly not true. The D.C. Circuit expressly set forth its "more searching inquiry" standard twice and explained that this standard of review is necessary to ensure that the district court does not invade the province of the jury. App. 5 & 10. The law of the D.C. Circuit is that district court orders granting new trials are suspect and must be subjected to heightened appellate scrutiny to ensure that the right of civil litigants to a jury trial is protected.

In short, given the foregoing, this Court must draw several conclusions. The first is that Tri County, during briefing in the court below, operated under the mistaken premise that the abuse of discretion standard of appellate review is the same as the D.C. Circuit's "more searching inquiry" standard of review (and that it now clings to that mistaken premise to protect its undeserved jury verdict). The second is that this Court and the Circuits have drawn a sharp distinction between the two. The third is that the decision below squarely conflicts with *Gasperini* and with the decisions of several other Circuits, including the Fourth and Seventh, on the very important issue whether the Seventh Amendment's right to a jury trial requires appellate courts to strictly scrutinize orders granting new trials or whether the usual abuse of discretion standard applies to review of such orders.

## IV. THIS COURT SHOULD NOT STAY ITS HAND BECAUSE OF ANY OF TRI COUNTY'S OTHER ARGUMENTS.

The District's Petition plainly presents an important legal issue on which the decision of the court below is in conflict not only with *Gasperini* but also with the decisions of several other Circuits. Tri County attempts to obfuscate this point by several other arguments. None is meritorious.

A. Tri County accuses the district court of subterfuge -- "attempt[ing] to make its Memorandum Opinion read as if the case involved the question of an excessive verdict." Opp. 10. This accusation is ridiculous. The District urged that the verdict was excessive and that was one of the precise findings the Honorable James Robertson made. App. 13.

B. Tri County argues that review should be denied because the District is to blame for the fact that the first trial was truncated. Opp. 5. This is false. For example, the District introduced letters extending to Tri County an opportunity to be heard on suspension of its license and then stopping the project when it failed to respond. The court struck this evidence and thereby seriously crippled the District's failure-to-mitigate defense on Tri County's claim that its permit was unconstitutionally suspended because it was not given an opportunity to be heard. Upon reflection, the court found the damages award excessive because Tri County, as the court knew, had failed to "invest[] a penny to seek reinstatement of the unlawfully suspended building permit," even rebuffing a written post-suspension invitation to be heard. App. 13.[4]

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[4]Tri County argues that it did not respond because it had already provided the information. Opp. 3. We disagree. See Brief (continued...)



C. Tri County asserts that "the District Court did not base its decision on . . . the exclusion of all testimony relating to the health and safety of the project . . .." Opp. 4. This too is false. In a refreshing display of candor, Judge Robertson assumed substantial responsibility for the trial's unjust outcome.[5] He should not be second-guessed in this respect.

## CONCLUSION

This is a case in which a district court judge, reflecting on the events of a trial over which he had just presided, concluded, rather courageously, that his evidentiary rulings had unfairly deprived the jury of information it needed to reach a just verdict and that, as a result, the jury had returned a grossly excessive ~~v~~verdict. A second jury, which heard the evidence that the judge had either struck or excluded, rendered a verdict of $100, rather than $5,000,000.

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[4](...continued)
for Appellees 3-4, 9, 28 & 40. In any event, this argument is irrelevant because Tri County's constitutional claim was that it had been denied process, not that the suspension was substantively invalid under local law, and here, the District was affording it process.

[5]He wrote: "The jury's award of future profits . . . was based on expert testimony that should not have been received --, or, at least, should not have been received *without allowing the District . . . to adduce proof* that plaintiff's soil remediation facility would never have been permitted to operate." App. 13 (emphasis added). He also wrote that the damages award was grossly excessive "particularly in view of the realistic prospect, *which I did not permit the defendants to prove at trial*, that there would be continued community resistance . . . and a very real likelihood that the District . . . would have closed down the remediation facility sooner or later in any event, or that it never would have been permitted to commence operations at all." App. 13-14 (emphasis added).

Under *Gasperini*, and the venerable principles it invokes, the trial judge's order was subject to a deferential standard of appellate review and should have been reversed only if it constituted an abuse of discretion. Instead, the court below applied a heightened standard of review and substituted its judgment for that of the district court.

Review of this decision is necessary not only because the court below applied the wrong legal standard, and then refused to correct its error even when *Gasperini* was brought to its attention, but also because there is an unmistakable conflict among the Circuits on the fundamental issue of the respective roles of district and appellate courts in awarding new trials.

Respectfully submitted,

ROBERT R. RIGSBY
*Corporation Counsel*

CHARLES L. REISCHEL
*Deputy Corporation Counsel*
*Appellate Division*

DONNA M. MURASKY
*Senior Assistant Corporation Counsel*
*Counsel of Record*

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Government of the District of Columbia
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Washington, D.C. 20001
Telephone: (202) 727-6252
(202) 724-5691